Non-Identity Problem in Context of Mitigating Historical Injustice
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Introduction

The *Counterfactual Account* of compensation posits that descendants of victims are owed compensation as they are left worse off as a result of the acts of injustice perpetuated upon their ancestors (Nozick, 1974). There is a wide range of objections to the *Counterfactual Account*: that it is epistemologically indeterminate and self-defeating (Waldron, 1992); that it does not explain why present generations or descendants of the perpetrators have the obligation to compensate victims (Butt, 2013); that it erroneously assumes that the counterfactual would necessarily have had the descendants lead better lives, and – finally – that compensation is unjustified in cases where the descendants would not have existed, had it not been for the initial act of injustice (the *Non-Identity Problem*) (Parfit, 1987). I recognize these are all issues but I will focus predominantly on showing why – at the very least – the *Non-Identity Problem* is not a valid objection to the account. Compensation is still justified on grounds of *de dicto* harm done to individuals in different possible worlds but who fall under a general description, which in turn wrongs the individuals that fit that description in the actual world.

The Question of Compensation

Consider the following paradigmatic case – *Slavery*. As a historical process, the slave trade coercively shipped millions of individuals from Africa to Europe and the Americas, against the will and wishes of the slaves. A commonly raised political claim is that the descendants of the slaves who are alive today are owed compensation for the historical injustice perpetrated on their ancestors. Whilst this claim appears intuitively plausible and valid, the underlying theoretical question remains – *why* are these descendants owed such compensation?

The Counterfactual Account

The *Counterfactual Account* posits that descendants of victims have claims of compensation because they would have been *better off* had the initial acts of injustice perpetuated upon their ancestors *not occurred*. As per the standard view of compensation (Nozick, 1974), "something fully compensates X for Y's action A if X is no worse off receiving it, Y having done A, than X would have been without receiving it had Y not done A"[83] To the extent that X has been

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83 Sher, p. 184.

made worse off as a result of an injustice done to X's ancestor, it appears that X has the *prima facie* claim right on some unspecified agent to be compensated. Let's say that an individual suffers *counterfactual-comparative harm* if they are worse off than they otherwise could have been "in the most probable outcome if the injuring act had not occurred."[84]

There are several plausible mechanisms through which historical injustices can result in *counterfactual-comparative harm* for the descendants of their victims, through impacts on i) financial inheritance (of property and wealth), ii) capability and physical capacity*;* iii) psychological unity or iv) wider social and political structures. These are all cases where it seems that the welfare of the descendants *could have been much better had the initial injustice not occurred.* The *Counterfactual Account* therefore seems to support the view that they are entitled to at least some mitigation.

The *Non-Identity Problem*

A key objection to this claim is the *Non-Identity Problem* (Parfit, 1984); this will be the primary objection considered and addressed in this piece. Three assumptions underpin this objection which essentially seeks to show that descendants have no claim to compensation if – in a world without the initial injustice – they would never have been born.

> [1] The *fragility* of existence assumption: had the conditions precipitating an individual's conception[85] been even slightly different, the *very same individual would not have existed*, another individual would have existed instead (even if they share largely similar characteristics and attributes). Roberts (2007) claims that the same individual could be conceived despite differences in their conditions of conception; however, the *Butterfly Effect* of causation suggests that even a slight and seemingly irrelevant change at some time t0 could affect the *identity* of the individual who is conceived at a time later than or equal to t0. Trivially, an individual conceived at a slightly earlier or later time than t0 does not share the exact same attributes (*e.g.* time of conception) as the individual conceived at t0.
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> [2] The *comparative account of harm*: an individual X is not harmed by action A unless X enjoys less utility in a world with A than in a world without A. As such, an individual brought into a flawed existence, *e.g.* a child born into slavery – so long as they are living above the threshold of 0 utility – is not harmed by their existence because they would not have existed in a world without A.
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> [3] The *assumption that existence is preferable to non-existence*: a flawed

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84 Butt, p. 6.

85 This assumes conception is the moment the identity of a life is fixed and does not change.

life, whilst ridden with suffering and pain, is still preferable to the
absence of life. The implicit assumption is that flawed existences still
have positive utility whilst the absence of existence has none.

Given these three assumptions, it appears that descendants of victims of injustice are not harmed by events that precede their birth. Had these events not occurred, they would not have existed. To the extent that their welfare levels are better in this world as compared to any other world in which they do not exist, it appears that they are not harmed by the prenatal act of injustice. To the extent that any claims to compensation require the existence of some comparative harm, it appears that no descendant of victims of injustice has a legitimate claim to compensation.

A potential response to the above problem is to shift the justification for compensation from *harm* to *wrong* – call it the *Modified Counterfactual Account*: descendants of victims have claims of compensation because they would not have been *wronged* had the acts of injustice perpetuated on their ancestors not occurred. The shift from *harm* to *wrong* expands the set of potential features of events that warrant compensation, thereby potentially avoiding the specific objection that the individual would not have existed (and hence 'worse off') had the act of injustice not been perpetuated. Two types of wrongness accounts I will consider: the *Uncomparative Wrong Account* and the *De Dicto Wrong Account*. The first I will reject; the second I will show is preferable.

The Uncomparative Wrong Account

Consider first the proposition that individuals could be wronged in a non-comparative manner, through the violation of their entitlement to living in a particular way. Woodward (1986) offers the view that "[I]t was possible to wrong a person by violating a specific obligation owed to that person even though one's actions advantageously affect that person's other interests in such a way as to make him, on balance, better off than any other action one might have taken."[86] Woodward justifies this claim by appealing to a series of thought experiments which seek to demonstrate that an individual can be wronged by a particular action X even though X improves their aggregate welfare. When applied to the cases of historical injustice, these obligations may include the obligation not to introduce an individual into an existence with severe leg ailments or governed by oppressive societal structures. It is worth noting that Woodward is deliberately ambiguous about who such obligations apply to: these obligations could arise either from specific parental and procreative obligations (hence parent-specific) or from correlated, primitive rights not to be introduced

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86 Woodward, p. 812.

into such forms of existence (thus based on irreducible claims held by the individual). Both possible subjects support the obligation argument.

Parfit (1987) raises an objection to this argument based on the absence of regret. He reasons that it is unlikely that individuals who live flawed existences would regret having been born for they intuitively find their existence preferable to non-existence in the first place. If they wouldn't regret their existence, it is unclear why they are owed any compensation for their admittedly flawed but non-regrettable existences. This objection undermines Woodward's claim because it posits that even though such *prima facie* obligations are violated, the absence of actual regret suggests that no compensation is required.

There are three possible replies to Parfit that allow Woodward's uncomparative wrong account to withstand this challenge. The first reply is the *hypothetical denial* – it is unclear if individuals indeed do not regret their flawed existences. Trivially, individuals who are born under severely oppressive social structures inherited from slavery or colonialism may resent their existence to the point of regretting it. A potential rejoinder to this reply may be to posit that Parfit's claim is not about whether individuals *actually* would regret their existences but whether it is *reasonable* for them to do so. However, this rejoinder is susceptible to the following two objections:

[1] The argument from *intrinsic wrongness*: Given that event X necessarily entails Y; whilst X is not regrettable, the intrinsic wrongness in Y can still be regrettable and hence a legitimate ground for compensation in spite of its being the necessary consequent of X. To visualise this, consider the case of a rape of which the victim is unaware and has no memory (so there is no trace of it in his subjective conscious states) but he becomes substantially wealthier than he would have been otherwise. However, the man still has a legitimate claim to compensation against his rapist for the very fact that the violation of his autonomy and consent through rape is intrinsically wrong. The intrinsic wrongness results from the violation of rights the man has independent of his conscious awareness. Even if he experiences only net positive utility (from becoming significantly wealthier), he is still owed compensation for the act of wrongness that cannot be mitigated by the resultant benefits (Woodward, 1986).

[2] The argument from *temporal misplacement*: At best Parfit demonstrates that it is unreasonable to regret one's existence *after* being brought into existence. However, it is worth noting that this challenge could be circumvented by positing that an individual has claim to compensation at some time *after* their conception if they could justifiably object to their existence at some time *prior to* their conception. The logic here parallels most appeals to ideal choice theory which often asks, "Had the individual been able to choose at a time prior to their conception, would they have chosen otherwise?" If individuals may object to being born as children of slaves and/or with severely

disfigured legs due to historical injustice, it appears that the regret-based challenge can be largely mitigated.

Whilst Parfit's challenge appears to be resolved, this account as a whole remains unconvincing. Consider first the *temporal misplacement* challenge above; whilst this challenge successfully bypasses Parfit's objection by shifting the time at which the regret test is applied, it has a gaping metaphysical flaw: prior to the time of conception, the individual *does not exist*. Thus the question whether *this* individual would object to their own existence prior to the time of conception is moot because the individual does not exist. Furthermore, it is unclear if most descendants of victims of historical injustice are indeed violated to the same extent as the victim in the rape case[87]. Woodward could reply that there may be an obligation not to introduce an existence who is a descendant of a victim of historical injustice (a crafty attempt to define *away* the problem). It is unclear such an obligation even exists as it seems to imply victims of historical injustice ought not to have any children! But this seems at best counterintuitive and at worst deeply contrary to basic understanding of procreative liberties. Woodward's version of uncomparative wrongness therefore seems to fail to solve the *Non-Identity Problem*, let alone justify compensation for descendants of victims of historical wrongs.

An alternative version of the *Uncomparative Wrong* Account is a *thresholdist* view (Steinbock, 2009) that a procreative act may wrong a person by introducing them to a life that is *barely worth living* but still beneath the *threshold* to which a reasonable person is entitled. In other words, descendants of victims may lead lives with positive net utilities but which are still not worth living. This seems intuitively justifiable by appeal to the idea of a bare 'minimum' of well-being so that any life that is worth living should encompass a set of sufficiently satisfied capabilities and capacities *à la* Nussbaum's *capability approach* to welfare. A life worth living would lie above a threshold of zero net utility where the individual is indifferent to whether they are alive or non-existent. Any life deemed to be worth living should be pursued and preferred *actively* to death. If this account is true then individuals can be wronged by being brought into existence even if their existence has positive utility but the utility lies beneath the threshold. If individuals are wronged, then

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87 One might interject here that concept of *intrinsic wrong* is not wholly uncontestable or definite. There are clear and distinct cases of intrinsic wrongness, for instance, rape or murder. Yet that does't negate the fact that there are no hard and fast rules for differentiating 'intrinsically' wrong acts from acts that are not, particularly in borderline cases such as conscionable lying or inflicting disproportionately grievous bodily harm to preempt future attacks. The upshot here is that confidence in the belief that *intrinsic wrongness* is a readily understood and definable concept may well be misplaced given the wide-ranging and often culturally sensitive plurality of intuitions about intrinsic wrongs.

by these criteria, they can be owed compensation.

There are two issues with this response. First, it is unclear whether such a threshold exists in a meaningful sense. If the threshold is set at a point that is too high (Steinbock, 2009), it appears to insinuate that a large number of lives that *currently exist* are not worth living. Whilst the threshold of harm required to remove an already existing life is substantially higher than that required not to introduce a new life, this still counterintuitively implies that many individuals are currently leading lives that are *not worth living,* even if they personally disagree. This matters because it also implies that individuals can be owed compensation even if they do not feel the need for compensation. Also it is unclear how high the threshold can go until it becomes excessive. If the threshold is set at an uncontroversially low level, it appears to largely resemble the current '0-utility' baseline that is already used in the welfare comparisons and it fails to account for injustices which, whilst egregious and immoral in and of themselves, do not render the lives of their victims worse off than had they not existed.

Secondly, it is unclear whose interests could be used or appealed to in determining the constituents of such a threshold. If the threshold is modeled after a hypothetical 'ideal' person, it is unclear why the *ideal person* should have any bearing on what compensation the *non-ideal individual* is owed in actuality; more importantly, it is an empirical fact that many descendants of victims of historical injustice are clearly not living beneath such thresholds in actuality. Yet the intuition remains that they deserve some form of compensation; this suggests that this thresholdist conception of the *Uncomparative Wrong Account* is either severely incomplete or altogether fails to ground the intuitions that underpin reparative justice.

The *De Dicto Wrong* Account

An alternative account of wrongness is Parfit's (1987) view that person P commits some wrong upon P's failing to satisfy some principle such as the principle of utilitarianism, *e.g.* maximising the aggregate utility given the options available to an individual. Taken on its own this account of wrongness seems largely irrelevant to the problem of compensation under discussion here: perhaps those who committed a historical injustice also committed a wrong by violating a principle that prohibits causing a flawed existence, but why should the violation of such a principle justify any claims to compensation for living a flawed life?

Leaving this account aside but retaining the view that the claim to compensation is grounded – at least partially – in the actions of the original wrongdoer, the *De Dicto Wrong* Account offers a viable solution to the *Non-Identity* challenge. It is worth introducing here the following metaphysical

concepts: '*de dicto* identity' implies two or more objects satisfy the same *description*; '*de re* identity' implies two or more objects are *numerically* identical. For instance, the statement "The 45th President of the USA could have been someone other than Donald Trump." is possibly true on a *de dicto* reading (after all, Hillary Clinton could have won the election), but a contradiction on a *de re* reading (Donald Trump could not have not been himself, by the law of identity). Descriptions are *general*: they can map onto different individuals in different possible worlds, assuming Lewis's framework (Lewis, 1973). A *particular* is a specific counterpart that satisfies a certain *general description* in a possible world, *e.g.* in this world Donald Trump is the *particular* of 'The Successor of Barrack Obama' which is what I call a *general*.

Applying these concepts, descendants in this world are *particulars* who are owed compensation because they are *wronged* by the *harm* to their *generals*[88] Note here that the particular individual is *wronged* (non-comparatively), whilst their *de dicto* general is *harmed* (comparatively – comparing the particulars across different worlds). Here is an example to illustrate the claim: in World X, some injustice was done to Mother, leaving her only child, Child X, born into a life of misery and suffering; in World Y, no injustice was done, which enabled her child, Child Y, to be born into a life of happiness and fulfillment. Note that the *Non-Identity Problem* suggests that Child X has no claim to compensation even though Child Y leads a life of comparative happiness and fulfillment. I reject this conclusion. Child X and Child Y are *de re different* (numerically different) but *de dicto identical* (identical under their general description as the 'Child of the Mother' where 'the Mother' is used indexically) thus a comparative harm was done to the *general* – the 'Child of the Mother' is worse off in World X as compared to in world Y. Thus, the historical injustice has *wronged* the actual 'Child of the Mother' in this particular possible world.

Three Objections to the *De Dicto Account*

There are three objections to this account:

> [1] The *Queerness* objection: the comparative 'harm' to the 'Child of the Mother' appears to be fundamentally queer as it is unclear how a non-existent, *general* could be harmed by a particular decision.
> [2] The *Irrelevance* objection: why should the comparative harm to the 'Child of the Mother' have any moral bearing on the particular?
> [3] The *No Ground* objection: to the extent that the particular is affected,

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88 Hare introduces the distinction between a *general* and a *particular* in his article (Hare, 2007) which I borrow though his approach is significantly different from the one I pursue here.

it is unclear why this particular form of effect justifies compensation.

Resolving these three objections (see Reiman (2007) and Hare (2007)) can substantially strengthen the account of *de dicto wrongness*.

Consider first the *Queerness* objection. This objection challenges the validity of the claim that a particular description can be harmed since the description is non-actual and does not exist in actuality. At best, the description refers to a collection of potential persons connected by a common description so if none of these persons is harmed by the particular action, how can the description be harmed? This objection can be resolved through a metaphysical clarification; the view that only actual or existent objects can be harmed is often grounded in the metaphysical intuition that harm must necessarily be manifested in some concrete, actual physical processes; however, if we suspend this assumption and adopt a purely comparative account of harm, it is not implausible that a description can be 'harmed' in the sense that there is a discrepancy between the situation of its particular in *this possible world* and the situation of an alternative particular in *another possible world.* Therefore, there is nothing inherently queer about harming a description. More importantly, this clarification also highlights a particular strength of the *de dicto account*: it preserves the intuition that there is some form of harm to some 'individuals', *i.e.* those who fall under the *general descriptions,* without requiring there is harm to the particular individual who exists in actuality. In other words, the harm to a description is itself a sufficient wrongness-causing feature for the particular manifestation of the description that in fact exists.

The *Irrelevance* objection echoes Parfit's concern that there is an explanatory gap between the idea that the act of injustice makes things worse for the 'Child of the Mother' and the idea that doer of the injustice wrongs her child *in this world*. Parfit posits that there is no "familiar moral principle"[89] that supports this hypothetical linkage. A potential response may draw upon the idea of *opportunity cost*; Bob could write a recommendation letter for Ruth with the result that Ruth receives a job offer that pays her 100,000GBP per year; alternatively, Bob could write her a letter that allows her to be offered thrice the salary. Bob chooses the former for no particular reason, causing Ruth to be deprived of the *opportunity* of earning 300,000GBP. Ruth-in-this-world earns merely 100,000GBP per year whilst Ruth-in-a-possible-world earns 300,000GBP per year. Given the disparity between the two scenarios, and assuming that if Bob had chosen otherwise he would not have incurred a substantial cost (if any), it appears that Bob may owe Ruth 200,000GBP. Yet the *Recommendation Letter* thought-experiment is apparently flawed on two levels: i) it is unclear Bob in fact owes Ruth anything since any benefit she receives is

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89 Parfit p. 359; Wasserman, p. 530-533.

the outcome of a voluntary, supererogatory act on his part; and ii) the *Recommendation Letter*, unlike the *Non-Identity Problem*, is not identity-changing: it is possible to identify the very same Ruth across both 'possible worlds' whilst it is impossible to do so for cases where the *Non-Identity Problem* arises. This response to the *Irrelevance* objection seems untenable (Parfit, 1987).

It may be worth moving onto the *No Ground* objection and returning later to the *Irrelevance* objection as we will see that the solution to the former also offers an indirect yet sufficient response to the latter. Suppose it has been shown that the general 'Child of the Mother' is *harmed* by the act of injustice, the 'Child of the Mother' may be justified in making *prima facie* claim to mitigation. As I argued above, however, it is *de facto* impossible to compensate a *general*. To the extent that there is a duty to compensate the 'Child of the Mother', and given that, being a *general*, the 'Child of the Mother' does not exist, the *next best way* to discharge such a duty is to compensate the actual individual who is most proximately related to the general. The child born in the actual world is the most intimately connected to the description 'Child of the Mother' than any other actual person. Thus, the actual particular in this world is owed compensation in spite of the *Irrelevance* objection. Intuitively, where direct compensation is impossible, compensating the most proximately related person may be required.

What accounts for the unique relation that renders the child in this world most intimately connected to the 'Child of the Mother'? The description 'Child of the Mother' can be decomposed into a conjunction of all of its particulars existing across different possible worlds, *i.e.* 'Child of Mother' = {Child-in-this-world, Child-in-W_1, Child-in-W_2, … etc.}. As such, the child in this world (the particular) *is included in* the 'Child of Mother' (the general). A duty owed to the general is discharged through compensating a component of it. Whilst this solution seems rather counterintuitive, it has two distinct analytical advantages: (i) It preserves the intuition that the compensation is targeted towards *some wrong* done t *some individual* (the general); (ii) It achieves (i) without requiring proof either that an individual is wronged according to some arbitrary or unsubstantiated absolutist metric or that a particular individual is *worse off* (thus obviating the *Non-Identity Problem*).

Two Further Objections

A further objection is that this account appears to 'prove too much'. If the ground for compensation requires merely that the *general* is *worse off* in this world, it appears to suggest that whenever the welfare of the *general* is not maximised by an action in this world (*i.e.* there is some possible world where the particular is better off than the particular in this world), the particular in this world is owed compensation. If this were the case, it would suggest that so long as there is some possible world where some particular is better off, their

counterpart in this world should be compensated, *e.g.* if there is a 'Child of the Mother' who leads an incredibly luxurious life in another possible world, then the child in this world should be compensated for the difference between his life in this world and his extravagant life in that optimal world even if there were no act of injustice that precipitated his existence. Call this the *Excessive* objection.

The *Excessive* objection is misguided; it can be resolved through some basic clarifications of the idea of compensation. Compensation seeks to identify what follows from a particular voluntary action, *i.e.* what can be directly attributed to that particular action. In the *Mother's Only Child* case the injustice to the mother *directly influences* the welfare of the 'Mother's Child' because if the act of injustice had not occurred, Child Y – with higher levels of welfare than Child X – would have been born. Therefore, the amount for which the child ought to be compensated (on grounds of reparative justice, at least) purely corresponds to the disparity between Worlds X and Y, the worlds with or without the act of injustice. On a more general note, the amount for which the descendant of the victim can claim compensation is constrained by the choice options available to the victimiser; it would be unreasonable to cover the difference between the extravagant life led in some possible world and the actual life he lives. Instead, the basis of comparison should simply be with the situation where the injustice is not committed. Any compensation on other grounds, *e.g.* grounds of 'bad moral luck', falls outside the parameters of compensation and is not due. Furthermore, note that the question of compensation is merely but one amongst many desiderata of justice; there are considerations of reasonability and other side-constraints that restrict the extent to which compensation can justifiably be sought and claimed by individuals in real life. So it is untrue that this account 'proves too much' with respect to how much compensation can be claimed.

The second objection is that this account is inconclusive in certain cases. Consider the World X in which historical conquest leaves an originally very affluent country heavily plundered and savaged; in order to replenish the national wealth, the Conquistador mandates that every family give birth to at least four children. Some couple A and B give birth to C, D, E and F. In World Y (where the conquest does not occur), the couple would only have one child, C*. The *De Dicto account* seems to suggest that C, D, E and F are entitled to the welfare C* would otherwise have had but this looks like *overcompensation* given that the counterfactual only contains one C*. Call this the *overcompensation objection*.

The first rejoinder to this objection is to note that it is possible to restrict the scope of the *de dicto* identity by further specifying it as 'The First Child of A and B' so that only C would be compensated. This avoids the concern of over-compensation but also illustrates a further point: it is generally possible

to modify the direct description of the victim (e.g. 'First Child of A and B'), by introducing further, specifying details about them, such that there is exactly one individual per world that satisfies the general description. Or we can just bite the bullet and accept that C, D, E and F all ought to be compensated. It is merely a matter of moral luck that D, E and F were not born in place of C as the first child of A and B. A *luck-egalitarian* modification could support the view that all of them are equally entitled to the compensation that they *would have received* had it not been for the *element of luck*. In any case, one thing remains constant across both replies: at least one of the descendants of the victims has a claim to mitigation.

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Conclusion

In conclusion, I have tried to defend counterfactual-based accounts of compensation for historical injustice against the *Non-Identity Objection*. I reject accounts that appeal to uncomparative wrongness on the grounds that they either fail to justify the validity of their postulated wrongness-making features (Woodward's rights-based account (Woodward, 1986)), or that they are unable to reconcile their thresholdist metric (Steinbock, 2009) with common intuitions about what lives are worth living. I attempt to show that the *De Dicto Wrongness* account (Hare, 2007) has the advantage that it is able to retain to some degree the intuition that persons are wronged without assuming the burden of demonstrating comparative harm to an actual person. The counterfactual account may be problematic for various reasons but at the very least, the *Non-Identity Problem* has been shown to be much less a valid objection than it may initially seem.

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